Supreme Court, U.S.
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No.
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IN THE

Supreme Court of the United States

SAMMY R. MCKNIGHT, PETITIONER

v.

ROBERT MICHAEL GATES,
SECRETARY, DEPARTMENT OF DEFENSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Middle District of Tennessee, which granted Respondent's motion to dismiss for failure to state a claim. This appeal challenges the Sixth Circuit Court of Appeals' holding regarding the pleading requirements pursuant to the Federal Rules of Civil procedure for claims under the Age Discrimination in Employment Act. The three questions presented are as follows:

1. Whether Plaintiff, a federal employee, must plead intent in a disparate impact theory of recovery to meet the pleading requirements under the Federal Rules of Civil Procedure?

2. Whether a disparate treatment claim pleaded and based on a federal annuitant's status is sufficient to meet the pleading requirements under the Federal Rules of Civil Procedure?

3. Whether a federal employee must give notice to the Equal Employment Opportunity Commission, after exhausting his administrative remedies, before bringing a class action age discrimination suit.

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OPINION BELOW

The opinion of the Court of Appeals (05-15375-E) is unreported. However, the opinion is included herewith in the Appendix. The opinion of the District Court is reported, McKnight v. Gates, Slip Copy, 2007 WL 1849986 (M.D. Tenn.), and is also included herewith in the Appendix.

JURISDICTION

The order of the Court of Appeals denying a petition for rehearing en banc was entered on October 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

29 U.S.C. § Prohibition of age discrimination

> (a) Employer practices
> It shall be unlawful for an employer—
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT

The Petitioner, Mr. Sammy R. McKnight, retired from federal service with the United States Department of the Army (hereinafter "Army" or "Agency"), after his last tour of duty ended in South Korea. After his retirement, Mr. McKnight was considered a federal government civil service retiree and annuitant because a retired employee of the federal government, who has reached at least the minimum retirement age, who receives an annual annuity, resulting from his or her years of service with the federal government, is considered an annuitant. The general rule to qualify as an annuitant is that the employee must have reached the minimum retirement age, over the age of forty (40), and have the requisite years of service. Although there are exceptions to qualifying as an annuitant, the overwhelming majority of annuitants are over the age of forty (40), and annuitants are functionally equivalent to retired employees over the age of forty (40).

In October, 2003, Mr. McKnight timely applied for the position of General Supply Specialist GS-2001-11, with the Agency. On January 26, 2004, the Agency offered Mr. McKnight the position, and two (2) days later Mr. McKnight accepted the offer.[1]

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[1] Mr. McKnight accepted the position with the Agency, which would have allowed him to return to South Korea. Mr. McKnight intended to return to South Korea to allow his wife, who is from South Korea, to be closer to her family, however, his wife died shortly after the Agency withdrew its offer of employment.

On February 9, 2004, Mr. McKnight was informed during a telephone conversation with Ms. Pae Son, a Human Resources Specialist with the Civilian Personnel Advisory Center (hereinafter "CPAC") in Seoul, South Korea, that his hiring action had been suspended due to the Department of Defense (hereinafter "DOD") memorandum. Subsequently, on February 20, 2004, Mr. McKnight received an electronic mail message from Ms. Son with a copy of the Memorandum attached along with an official letter from the selecting official, Mr. G.E. Zentner, which officially withdrew the job offer. A current Civil Service employee, who was not an annuitant, was hired for the General Supply Specialist position.

The DOD Civilian Personnel Management Services, through Director Charles A. Rogers, issued the memorandum, entitled "Employment of Annuitants" on February 3, 2004. The Employment of Annuitants' Memorandum (hereinafter "Annuitants' Memorandum") was issued as a result of Section 9902 of Title 5 of the United States Code, as enacted by Section 1101 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392, 1629 (November 24, 2003), which created new policies encouraging and relating to the hiring of annuitants within the DOD. The new DOD policies were to provide critical hiring flexibility with regard to annuitants, so as to ensure there would not be a "drain" on talented, capable DOD employees, as an increasing number of employees retired from the Civil Service. The purpose of the National Defense Authorization Act was to provide an incentive to experienced employees, who were receiving an annuity, to return to work or continue working, by allowing them to keep their

annuity.

The Annuitants' Memorandum effectively suspended all hiring actions of annuitants within the DOD. Specifically, the Annuitants' Memorandum stated that " the [DOD] is developing policy and procedures for the employment of annuitants...Because of pay considerations inherent to annuitant appointments, all such hiring actions should be suspended until the DOD policy is implemented." The Annuitants' Memorandum was openly discriminatory on its face, since it directed the Human Resources and selecting officials to exclude a specific group of people, annuitants, who are virtually all over the age of forty (40).[2] The vast majority of the annuitants obtain their annuity by amassing the requisite years of service and reaching the minimum retirement age, over the age of forty (40). Although there are other possible means for annuitants to obtain the status, in the context of this litigation, the percentage is negligible, since the purpose of National Defense Authorization Act was to reach and reemploy, older, retired, experienced workers.

The Annuitants' Memorandum temporarily excluded the annuitants from competing for DOD

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[2] The Petitioner subsequently uncovered as a matter of public record that the Agency, through the Defense Logistic Agency, had further implemented and adopted a directly discriminatory policy from 2004 through 2005, in which it prohibited the reemployment of annuitants, unless the annuitant forfeited his or her annuity. The Petitioner was prohibited from discovering this information, which was additional direct evidence of discrimination, since the district court dismissed the case on the pleadings for failure to state a claim, and he was never permitted to conduct discovery.

positions. Although the DOD had only temporarily excluded annuitants from the application process, it did not suspend its hiring processes. As such, the DOD continued to fill positions at the time, and the annuitants were excluded from competing for the positions. As such, the DOD targeted and discriminated against a group of applicants, on account of their age.

The prohibition against hiring annuitants was in effect for approximately fifty (50) days, until a memorandum, dated March 25, 2004, created a new policy for annuitants, which allowed them to continue to receive their full annuity, while receiving full salary for their civil service positions. During this fifty (50) day period, the DOD continued to fill positions, while excluding the annuitants.

Mr. McKnight made his initial Equal Employment Opportunity (hereinafter "EEO") contact on March 10, 2003, in which he complained that the Respondent had withdrawn its tentative job offer for a position which was located in Korea. Additionally, attached to the informal complaint, is a memorandum from Mr. McKnight which states: "To file a [class][3] complaint based on age wherein it is alleged that the suspension of annuitant appointments targets and discriminates against a select group of people by their age, specifically, including myself."

[3]The word "class" had been crossed out. It is not clear who crossed out the word "class," however, Appellant does not specifically recall crossing out the word "class."

On March 19, 2004, Mr. McKnight authored a memorandum to the EEO Counselor concerning his informal complaint of discrimination. This memorandum, stated in pertinent part: "...for DOD, CPMS, to issue a memorandum suspending all hiring actions concerning annuitants is highly unfair and unjust to the detriment of all concerned annuitants and to myself and is a case of discrimination against them and myself because of age." The EEO Counselor's report indicates that Mr. McKnight's allegation included the following: "...the DOD memorandum was highly unfair, unjust and discriminatory against all annuitants, especially himself." Mr. McKnight filed his formal EEO complaint on April 4, 2006. Again, Mr. McKnight stated that he was complaining on behalf of himself and the other annuitants. Specifically, Mr. McKnight alleged that "The DOD memorandum suspending all hiring actions concerning annuitants was DOD's attempt to limit the number of annuitant appointments...was by DOD an act of targeting and discriminating against a select group of people by their age, specifically including myself." Ultimately, Mr. McKnight received a final agency decision (hereinafter "FAD") finding that the Agency did not discrimination on both his claim and his class claim. Mr. McKnight subsequently appealed the Agency's FAD to the Equal Employment Opportunity Commission's (hereinafter "EEOC") Office of Federal Operations, who again ruled against his class claim and his individual claim.

Mr. McKnight subsequently brought a de novo action in the United States District Court for the Northern District of Georgia, however, the case was removed to the United States District Court for Middled District of Tennessee. The District Court

dismissed Mr. McKnight's claim pursuant to Federal Rule of Civil Procedure 12(b)(6), with an opinion. Mr. McKnight subsequently appealed the decision to the United States Court of Appeals for the Sixth Circuit, which held upheld the District Court's opinion, and subsequently denied a petition for rehearing en banc. This petition lies there from.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' RULING THAT A PLAINTIFF MUST PLEAD DISCRIMINATORY INTENT IN A DISPARATE IMPACT CLAIM IS CONTRARY TO THE HOLDINGS OF THIS COURT AND HAS CREATED A SPLIT IN THE CIRCUITS.

In order for a court to dismiss a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (hereinafter "Fed. R. Civ. P."), all well-pleaded allegations in the complaint are treated as true, and dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Kostrzewa v. City of Troy, 247 F.3d 633, 638 (6th Cir. 2001).

Federal Rule of Civil Procedure 12(b)(6) authorizes a motion to dismiss for failure to state a claim upon which relief can be granted. However, motions to dismiss under Fed. R.Civ.P. 12(b)(6) are designed to test "whether a cognizable claim has been pleaded in the complaint." Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir.1988). Dismissal under Fed.R.Civ.P. 12(b)(6) is only appropriate when no set of facts exists which would

entitle the plaintiff to recover. Hammond v. Baldwin, 866 F.2d 172, 175 (6th Cir.1989). This rule allows the court to dismiss meritless cases which would waste judicial resources and result in unnecessary discovery. See, Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

This Court has held that a plaintiff should not be dismissed for failure to state a claim unless it appears beyond doubt that the he or she can prove no set of facts entitling him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The Plaintiff is only required to provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Id at 47. Thus,"[t]he Federal Rules of Civil Procedure do not require a claimant to set out in detail all the facts upon which he bases his claim." Id. at 47. "To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all material elements of the claim." Wittstock v. Mark a Van Sile, Inc., 330 F.3d 889, 902 (6th Cir.2003).

Additionally, Rule 8 of the Federal Rules of Civil Procedure allows for a "liberal system of notice pleading." E.E.O.C. v. J.H. Routh Packing Co., 246 F. 3.d 850, 851 (6th Cir. 2001). Thus, a Plaintiff must establish a right to his or her entitlement to relief beyond mere speculation, even if doubtful in fact. Papasan v. Allain, 78 U.S. 265; 106 S. Ct. 2932 (1986).

The Court of Appeals by affirming the District Court's dismissal for failure to state a claim has incorrectly held that Mr. McKnight has essential failed

to prove his *prima facie* case of disparate impact. The district court held that since Mr. McKnight's claim involved annuitants, his claim failed, since the Agency was permitted to discriminate based on a reasonable factor other than age. This ruling reaches beyond the pleadings and simply misstates the applicable law to disparate impact claims. Mr. McKnight met his pleading requirements for disparate impact and as such dismissal was premature.

The Age Discrimination in Employment Act (hereinafter "ADEA") was enacted to prohibit employers, including the federal government, from refusing to hire, discharging, or from otherwise discriminating against any employee or applicant on the basis of his or her age. 29 U.S.C. 623(a)(1). The ADEA is expressly applicable to federal government and its employees, who are treated separately from private employees, directly by the statute. See 29 U.S.C. §633a. "A claim of disparate impact, *unlike a claim of disparate treatment*, does not require a finding of intentional discrimination." Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir.1991)(emphasis added). The "necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* (internal quotations and citations omitted).

This Court has decided that employers may be sued under the ADEA for actions that have a disparate impact on older workers. Smith v. City of Jackson, 544 U.S. 228, 125 S.Ct. 1536, 1544, 161 L.Ed.2d 410 (2005). "Claims that stress disparate impact involve

employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." Smith v. City of Jackson, 544 U.S. 228, 239, 125 S.Ct. 1536 (2005) (citation, brackets and internal quotation marks omitted). Plaintiffs seeking to allege age discrimination based on a theory of disparate impact under the ADEA must "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities." Meacham et al. v. Knolls Atomic Power Lab,128 S.Ct. 2395, 2405-06 (2008) (brackets, citation, and internal citations omitted). As "it is not enough to simply allege that there is a disparate impact on workers, or to point to a generalized policy that leads to such impact..." Smith v. City of Jackson, 544 U.S. 228, 241 (2005)(quoting Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 656 (1989)(quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988))).

In Meacham v. Knolls Atomic Power Laboratory this court recently again addressed disparate impact cases by stating that "in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though because of age) is attributable to a 'nonage factor." Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395 (2008). Thus, "actions based on a 'factor other than age' is the very premise of the disparate-impact liability in the first place, 'not a negation of it or a defense to it'." Id. A defendant in a disparate impact claim, seeking to raise a reasonable factors other than age defense, "must not only produce evidence raising the defense, but must also persuade the fact finder of its merits." Id. Therefore, the instant case was no ripe for a dismissal

under Federal Rule of Civil Procedure 12(b)(6).

The Court of Appeals in upholding the District Court's published opinion, is in direct contradiction to the relevant decisions of this Court. See Smith v. City of Jackson, 544 U.S. 228, 239, 125 S.Ct. 1536 (2005); Meacham et al. v. Knolls Atomic Power Lab,128 S.Ct. 2395, 2405-06 (2008). The District Court noted, citing to Smith v. City of Jackson, that "due to specific language in the ADEA, a disparate impact claim can not succeed where the defendant's action was based on a reasonable factor other than age." The District Court made this determination, at the pleading stage without requiring the Agency to produce any evidence or meet its burden of persuasion. Smith v. City of Jackson, 544 U.S. 228, 239, 125 S.Ct. 1536 (2005).

In Mr. McKnight's amended complainant, he constantly referred to the affected class for his disparate impact claim, as older workers. Specifically, in paragraph 24 of the Amended Complaint, Mr. McKnight alleges "the issuance of the Memorandum freezing the hiring of annuitants evidenced discrimination toward a class of people due solely to their advanced age." Thus, pursuant to Federal Rule of Civil Procedure, Mr. McKnight had clearly alleged a disparate impact claim and has established that he was entitled to fully litigate the case. Pursuant to the Court's holding in Meacham et al. v. Knolls Atomic Power Lab, the burden should have shifted to the Defendant to "produce evidence raising the [affirmative] defense..." and to "...also persuade the fact finder of its merits." Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395 (2008).

Although this Court has ruled that in a disparate impact claim, a Plaintiff does not have to plead discriminatory intent, but instead pleads a discriminatory result, the Court of Appeals refused to follow this holding. The Court of Appeals, instead, incorrectly held that a disparate impact claim cannot succeed where the defendant's action is based on a reasonable factor other than age at the pleading stage. By ruling that the Plaintiff must plead that the reasonable factors other than age are false and must persuade the fact finder of the merits, the Court of Appeals has effectively shifted the burden to the plaintiff at the pleading stage. Moreover, the implication of the incorrect holding is that the Plaintiff must prove intent in a disparate impact theory of recovery.

As such, the Sixth Circuit has directly held contrary to the holdings of this Court by imposing a discriminatory intent requirement in a disparate impact claim. This ruling could further split the circuits since the published opinion of the District Court has been cited several times and has been specifically cited as grounds for failure to state a claim in Allen et al. v. Sears Roebuck and Co. et al., Case No. 2:07-cv-11706 (Eastern District of Michigan).

Other cases, which follow should the Sixth Circuit's incorrect decision be affirmed, may rely on the District Court's misapplication of the disparate impact analysis to Petitioner's claim. Furthermore, the District Court stated that Mr. McKnight has failed to allege that the employment practice in question negatively impacted a protected group. However, Mr. McKnight referred to the Annuitants' Memorandum and stated

that it had a negative impact on a protected group, i.e. older workers, in his complaint. Abbot v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990). Mr. McKnight clearly pleaded that older workers were being adversely impacted by this policy. Thus, the entire disparate impact claim is based on the fact that the Annuitants' Memorandum, even if considered neutral on its face, had a disproportionate affect on a legally protected group, older workers. Griggs v. Duke Power Co. 401 U.S. 424 (1971). The focus of a disparate impact claim is whether a protected group was disproportionately impacted by the action, not whether the Agency intended to disproportionately impact the protected group. Thus, the Court of Appeals, in upholding the District Court , has held that a Plaintiff must prove intent to meet his pleading burden.

Mr. McKnight has met this requirement, by identifying a specific employment practice, the policy contained in the Annuitants' Memorandum, which limited the candidate pool by excluding older workers, as the basis for the disparate impact claim. As such, it is clear that Mr. McKnight sufficiently pleaded his claim for disparate impact age discrimination and that the Court of Appeals must be reversed.

II. THE COURT OF APPEALS' HOLDING THAT DISPARATE TREATMENT BASED ON ANNUITANT STATUS CAN NOT BE CONSIDERED AGE DISCRIMINATION IS CONTRARY TO THE PRECEDENT OF THIS COURT AND CREATES A SPLIT IN THE CIRCUITS.

The Court of Appeals' decision also upheld the District Court conclusion that Mr. McKnight has not sufficiently pleaded a claim of age discrimination under a disparate treatment theory. Even though Mr. McKnight pleaded an age discrimination claim, the Court of Appeals, in affirming the District Court, has singled out evidence of annuitant status, to look beyond the pleadings to the evidence of the case. This decision clearly contradicts the precedent of this Court and is creating a split in the circuits.

In proving a case, but not in pleading a case, a plaintiff, in seeking to assert an ADEA disparate treatment claim, must ultimately demonstrate that age was a motivating factor in the adverse employment action and that, but for this factor, he or she would not have suffered the alleged adverse employment action. Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023 (6th Cir.1993)(citing Chappell v. GTE Products Corp., 803 F.2d 261, 265-66 (6th Cir.1986), cert. denied, 480 U.S. 919 (1987)). Thus, in an age related claim, the plaintiff must prove that age was the motivating factor and had a determinative influence on the outcome. Kentucky Retirement Systems v. E.E.O.C., 128 S.Ct. 2361 (2008); Hazen Paper Co. v. Biggins, 507 U.S. 604 (2008).

A Plaintiff "may establish a *prima facie* case of

discrimination either by presenting direct evidence of intentional discrimination by the Defendant, or by showing the existence of facts which create an inference of discrimination." Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1248 (6th Cir.1995) (internal citations omitted).

Where no direct evidence of discrimination is available, the individual may establish his *prima facie* case of disparate treatment age discrimination with indirect, circumstantial evidence by showing that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the particular position; and (4) he was replaced by or treated differently from similarly situated but significantly younger persons or, in a failure-to-hire case, the successful applicant was a substantially younger person. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Grosjean v. First Energy Corp., 349 F.3d 332, 340 (6th Cir.2003); Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 371 (6th Cir.1999).

If the Plaintiff is successful in doing so, an inference of discrimination arises and the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). If the Defendant articulates such a reason, the Plaintiff must then prove by a preponderance of the evidence that the reasons offered were pretext. Id.

Notwithstanding the above, the *prima facie* case required under McDonnell Douglas is an evidentiary standard and not a pleading requirement. Swierkiewicz

v. Sorema N. A. 534 U.S. 506, 510, 122 S.Ct. 992, 997 (2002). Given the Federal Rules of Civil Procedure simplified notice pleading standard, a court in granting a motion to dismiss may only do so, if it is clear that there is no relief that could be granted to the plaintiff under any set of facts that are proved consistent with the allegations. Id at 514. "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." Id. "Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56." Id.

The Court of Appeals has essentially held that Mr. McKnight is precluded from litigating, since the Court of Appeals has misconstrued his complaint by stating that the exclusion of annuitants was not considered direct evidence of discrimination, since annuitants are a reasonable classification other than age. This holding clearly fails to account for the situation, where the term "annuitants" was a proxy for and functionally equivalent to age.

A. THE EXCLUSIONS OF ANNUITANTS CAN BE CONSIDERED DIRECT EVIDENCE OF DISCRIMINATION, WHERE THE ANNUITANTS' STATUS IS USED AS A PROXY FOR AGE IN A DISPARATE TREATMENT THEORY OF RECOVERY.

The District Court held, in its published decision, that Mr. McKnight's disparate treatment age discrimination claim failed, since under a disparate treatment theory, an adverse employment action based

on an employee's pension status or seniority does not violate the ADEA, and annuitant status was akin to pension status. Moreover, the Court of Appeals further agreed and separately held that this Court's ruling in Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993), which held that an adverse employment action based on an employee's pension status or seniority does not violate the ADEA, essentially precluded an employee included in pension status from averring a claim of age discrimination. The court of appeals effectively adopted the district court's holdings that Mr. McKnight had failed to plead a *prima facie* case of discrimination, since he failed to plead that the Agency intended to discriminate against him by using an acceptable classification of annuitants. Such a broad based rule that any and all discrimination on the basis of retirement, annuitant, or other like status, too narrowly construes the ADEA and is in direct conflict with the holdings of the Court. Kentucky Retirement Systems v. E.E.O.C., 128 S.Ct. 2361, 2367 (2008).

The District Court in this matter, in its published decision, concluded that Mr. McKnight failed to allege that the Defendant used annuitant status as a pretext for direct age discrimination. However, using direct evidence, it is not necessary to show pretext. Thus, the District Court dismissed Mr. McKnight's claim, a direct evidence case, based upon a failure to show pretext, was in error. The Sixth Circuit recognizes that if Plaintiffs can establish direct evidence of discrimination, then they need not go through the McDonnell Douglas burden-shifting analysis. See Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1248-49 (6th Cir.1995). Thus, using direct evidence, negates the burden of showing pretext.

In the Sixth Circuit, direct evidence is evidence that proves the existence of a fact without requiring any inferences. See Laderach v. U-Haul, 207 F.3d 825, 829 (6th Cir.2000); See Jacklyn v. Schering Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir.1999). Direct evidence of age discrimination "is that evidence which, if believed, requires the conclusion that unlawful discrimination *was at least a motivating factor* in the employer's actions." Laderach v. U-Haul of Northwestern Ohio, 207 F.3d 825, 829 (6th Cir. 2000)(emphasis added); see also Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1081 (6th Cir. 1994). Therefore, Mr. McKnight must, at a bare minimum, plead, which he if fact did, that the Agency was motivated to take the action as a result of the affected employees' age.

Moreover, the court of appeals, in citing Hazen Paper Co. v. Biggins, 507 U.S. 604 (2008), further held that since the Agency had affected its adverse employment action against Mr. McKnight on the basis of his annuitant status, and not his age, then the Agency could not have discriminated on the basis of age. The appeals court stated that since the Annuitants' Memorandum referred to annuitant status, it *could not be considered* direct evidence of discrimination, since this Court held that "adverse employment actions based on an employee's pension status or seniority does not violate the ADEA. Hazen Paper Co. v. Biggins, 507 U.S. 604 (2008). This holding is simply incorrect and improperly applies the holding of this Court, since it reaches to the beyond the pleadings to the evidence.

This Court held in Hazen Paper Co. v. Biggins, that "[a] plaintiff is not precluded from pursuing the possibility that an employer 'who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination.'" Id. Therefore, this Court specifically considered situations, where an employer could discriminate against an employee, on the basis of his or her age, even when the employer cited another, non-discriminatory reasons, such as annuitant status, under the assumption that the employee was likely to be older. This Annuitants' Memorandum clearly falls into the rule carved out in Hazen Paper Co. v. Biggins. See Hazen Paper Co. v. Biggins, 507 U.S. 604 (2008); Kentucky Retirement Systems v. E.E.O.C., 128 S.Ct. 2361, 2367 (2008). The Court of Appeals essential holds that as long as an Agency utilizes a retirement status, then it can never be utilized as direct evidence of discrimination. This holding requires that a claim for disparate treatment must have blatant discrimination, or intent to discriminate, even where the Defendant is utilizing a pension status, or other like status, as a proxy for discrimination.

This Court has further clarified its ruling that "discrimination on the basis of pension status could *sometimes* be unlawful under the ADEA, in particular where pension status served as a proxy for age." Kentucky Retirement Systems v. E.E.O.C., 128 S.Ct. 2361, 2367 (2008). The Annuitants' Memorandum is discriminatory on its face, since it seeks to exclude a group of applicants on the basis of their age. The policy of targeting the older workers and precluding them from competition for vacancies in the Agency is direct evidence of discrimination. Moreover, it is evident that

the Agency intended to exclude the annuitant applicants, who are virtually all in a protected age class, since it did not suspend the hiring process but instead chose to limit the candidate pool. The Annuitants' Memorandum was issued in response to the new DOD policies, which were meant to provide critical hiring flexibility with regard to annuitants in order to ensure there would not be a "drain" on talented, capable DOD employees as an increasing number of employees retired from the Civil Service. The Annuitants' Memorandum, was specifically targeted at older workers, and older workers alone, so as to suspend the new DOD policy, in order to reach applicants who were outside the protected class.

As such, it is clear from the pleadings that Mr. McKnight has averred that the Agency was at least motivated by the annuitants' ages in making its decision to limit the application pool during this time period, and Mr. McKnitght had therefore met the pleading standards. The Court of Appeals' holding that Mr. McKnight failed to state a claim, since the Agency discriminated against annuitants, clearly misconstrues the holding of this Court by ignoring the claims in which the reasonable factor other than age is merely a proxy for age. Moreover, Mr. McKnight had met requirements under the pleading standard for a disparate treatment age claim and the dismissal was premature.

B. DISCRIMINATION BASED UPON ANNUITANT STATUS CAN BE UTILIZED AS INDIRECT EVIDENCE OF DISCRIMINATION.

The Court of Appeals also affirmed the District Court's holding that Mr. McKnight had failed to establish his *prima facie* case of age discrimination, using indirect evidence, because he failed to allege that he was replaced by and/or the Agency hired a substantially younger employee. Again the district court utilizes the annuitants classification as the crutch of its ruling. The District Court only states that Mr. McKnight *prima facie* case fails on the basis that he did not identify the selectee as being younger. Although the parties had not been permitted to engage in discovery, it is clear that the selectee was not an annuitant, and as such was likely not in the protected class. Since the Agency clearly sought to limit the number of applicants in the protected class by excluding annuitants, the applicants, who were not annuitants, were likely all not in the protected class. Thus, Mr. McKnight had met his burden in pleading his case, and the Court of Appeals has again made a determination regarding the evidence.

III. A FEDERAL EMPLOYEE DOES NOT HAVE THE SAME REQUIREMENTS FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES, AS PRIVATE EMPLOYEES, IN CLASS ACTIONS CLAIMS.

The Court of Appeals concluded that Mr. McKnight had failed to exhaust his administrative remedies to bring a class complaint, under the ADEA.

In so ruling, the Court of Appeals determined that Mr. McKnight was obligated to give notice to the EEOC within 180 days of the alleged discrimination and to file the civil action no less than thirty (30) days after such notice is given, as set forth in Anderson v. Tennessee Valley Authority, 991 F. 2d 795 (6th Cir 1993). The Court of Appeals has held that Mr. McKnight had exhausted his administrative remedies with regard to his individual claim, however, it held that he did not exhaust his administrative remedies with respect to his class action claim. It is well established that a federal employee must timely exhaust any administrative remedies available to him before he can bring suit. Stevens v. Department of Treasury, 500 U.S. 1, 9, 111 S.Ct. 1562, 1568 (1991). Mr. McKnight has clearly exhausted his administrative remedies by requesting and receiving a final agency decision, and pursing the matter through EEOC's Office of Federal Operations. 29 C.F.R. 1614.2041(c)(3). A Federal Employee is under no further obligation take any additional steps to exhaust his administrative remedies. Id. The Court of Appeals prematurely dismissed the matter, by holding that Mr. McKnight did not raise a class action claim, which is an issue of fact.

The ADEA is expressly applicable to federal governmental employees, who are treated separately from private employees under the statute. See 29 U.S.C. § 633a. The statute provides:

> two alternative routes for pursuing a claim of age discrimination. An individual may invoke the EEOC's administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies. See

29 U.S.C. § 633a(b) and (c). A federal employee complaining of age discrimination, however, does not have to seek relief from his employing agency or the EEOC at all. He can decide to present the merits of the claim to a federal court in the first instance. See § 633a(d).

If the employee elects to pursue his administrative remedies, he "must initiate contact with a Counselor within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). It is undisputed that Mr. McKnight made timely EEO contact for an individual EEO complaint. In the complaint Mr. McKnight stated that the Agency had withdrawn its tentative job offer. Mr. McKnight complained that the Agency's decision to suspend the hiring of annuitants, targeted and discriminated against a select group of applicants based on their age.

The Agency's EEO Counselor is charged and required with being knowledgeable of the EEO process as prescribed under 29 CFR 1614. Thus, when Mr. McKnight initiated his EEO contact, he should have been advised of the administrative process that he needed to fulfill, to pursue his class complaint. The purpose of the EEO process and more importantly, the role of the EEO Counselor is to advise complainants of their rights and responsibilities. Pursuant to 29 C.F.R. 1614. 204(b), "an applicant who wishes to file a class complaint must seek counseling and be counseled..."

Mr. McKnight completed his requirement, which was to seek counseling. However, the Agency failed to uphold its portion of the requirement, in terms of its "counseling." Throughout the processing of Mr.

McKnight's EEO complaint, he continued to allege and use language, that referred to himself and others being discriminated against on the basis of their age. If Mr. McKnight is deemed to have failed to fulfill the administrative requirements for bringing a class complaint, is not due to any fault of his own. Furthermore, the Agency should not be allowed to benefit from its own failure. To conclude that Mr. McKnight did not exhaust his administrative remedies, in a situation in which he was not properly advised of such, is rewarding the Agency for its own failure.

It is clear that Mr. McKnight intended to pursue a class action claim, and the Agency should have counseled him on this claim. It is improper to dismiss Mr. McKnight's complaint for failure to state a claim, based on the factual determination that he crossed out class. This determination is one of fact and not proper for a motion to dismiss.

CONCLUSION

This petition should be granted because the Court of Appeals and the District Court have misconstrued the Age Discrimination in Employment Act, holding that annuitants' status cannot be considered in a disparate treatment age discrimination claim and that a plaintiff must plead intent to discriminate under a disparate impact theory. The petition should also be granted since the district court has placed an additional burden on a federal employee seeking to file a age discrimination claim in district court. Moreover, at a bare minimum, the ruling is in direct conflict with the relevant decisions of this Court and has the potential to create a conflict in the circuits.

Wherefore, Petitioner respectfully requests this Court to grant this petition and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-5853

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMMY R. McKNIGHT,
Plaintiff-Appellant,
v.
ROBERT MICHAEL GATES, Secretary, Department of Defense,
Defendant-Appellee.

June 23, 2008, Filed

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

JUDGES: Before: KEITH and SUTTON, Circuit Judges; ACKERMAN, District Judge. *

OPINION

HAROLD A. ACKERMAN, District Judge. Plaintiff

Sammy R. McKnight appeals the dismissal of his claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a, and the denial of his motion for class certification. We agree with the District Court that McKnight failed to exhaust his administrative remedies or otherwise comply with the prerequisites to file his class-based claims. With regard to his individual claims of age discrimination, McKnight failed to state a claim under the ADEA. For these reasons, we will affirm.

I.

McKnight is a retired civil service employee of the United States Department of the Army. He retired from a position in South Korea in 2001 as a federal annuitant. In October 2003, McKnight applied for a new position with the United States Department of Defense in South Korea as a General Supply Specialist. On January 26, 2004, he was offered the position, and he accepted the offer the next day. On February 9, 2004, he received a telephone call from a Human Resource Specialist in the Civilian Personnel Advisory Center in South Korea, informing him that his hiring decision had been suspended due to a Department of Defense ("DOD") memorandum that imposed a fifty-day hiring freeze with regard to all federal annuitants. This memorandum, issued February 3, 2004 by the DOD Civilian Personnel Management Services, stated in relevant part: "The Department of Defense (DOD) is developing policy and procedures for the employment of annuitants . . . . Because of pay considerations inherent to annuitant appointments, all such hiring actions should be suspended until the DOD policy is implemented." (First Am. Compl. Par. 15, JA at 25.)

The memorandum was issued in furtherance of 5 U.S.C. § 9902, which created new policies related to encouraging the hiring of annuitants by the DOD.

McKnight received an email containing the memorandum and an official letter withdrawing the job offer on February 20, 2004. A current Civil Service employee was subsequently hired for the General Supply Specialist position McKnight sought. However, McKnight does not identify the age of the hired employee in his Amended Complaint in this matter. The DOD annuitant hiring freeze was lifted after 50 days, on March 18, 2004, upon the promulgation of new DOD policy and procedures encouraging the hiring of annuitants.

McKnight first contacted the Equal Opportunity Employment Commission ("EEOC") on March 10, 2004, by way of an informal complaint. It stated, in type-written text, that McKnight wished "[t]o file a complaint based on age wherein it is alleged that the suspension of annuitant appointments targets and discriminates against a select group of people by their age." (JA at 158). The word "class" appears in the type-written text before the word "complaint", but "class" was crossed out. (*Id.*) At the end of this type-written sentence, the words "spefically including myself" are hand-written.[1] (*Id.*) Soon thereafter, McKnight wrote a memorandum to his EEOC counselor concerning the informal complaint. The counselor's report states that McKnight's memorandum alleged that ". . . the DOD memorandum was highly unfair, unjust and discriminatory against all annuitants, especially himself." (JA at 134.) McKnight filed a formal EEOC complaint on April 16, 2004. This formal complaint did

not contain any express class allegations. The EEOC mailed him a right-to-sue letter on February 15, 2006.

McKnight filed this purported class action against the Secretary of Defense in the Northern District of Georgia in May 2006. He alleged violations of Title VII and the ADEA. He filed a First Amended Complaint with the same claims in July 2006, and filed a motion for class certification in August 2006. In September 2006, the parties stipulated to the dismissal of the Title VII claim. The Government moved to dismiss for lack of venue, and the district court transferred the case to the Middle District of Tennessee. The Government thereafter filed a motion to dismiss. The District Court granted the Government's motion, and denied the motion for class certification.

The District Court had federal question jurisdiction over McKnight's ADEA claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over McKnight's timely appeal pursuant to 28 U.S.C. § 1291.

II.

We review the District Court's grant of the Government's motion to dismiss de novo. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008). A claim survives a motion to dismiss if "[f]actual allegations [are] enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (citations omitted). "[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff

will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 1969 n.8. However, the "'[f]actual allegations must be enough to raise a right to relief above the speculative level'; they must 'state a claim to relief that is plausible on its face.'" *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 2008 WL 822265, at *2 (6th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1965, 1974). Of course, this Court must construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in the plaintiff's favor. *Jones*, 521 F.3d at 559. "[W]e need not accept as true legal conclusions or unwarranted factual inferences." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *see also Twombly*, 127 S. Ct. at 1964-65 (holding that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions"). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

III.

The District Court held that McKnight failed to exhaust administrative remedies for his class action claims.[2] We agree.

For Federal Government employees, the ADEA does not explicitly require a plaintiff to exhaust administrative remedies before bringing suit. Rather, a plaintiff has two alternative routes pursuant to 29 U.S.C. § 633a. Under subsections (b) and (c), "[a]n individual may invoke the EEOC's administrative process and then file a civil action in federal district

court if he is not satisfied with his administrative remedies." *Stevens v. Dep't of Treasury*, 500 U.S. 1, 5, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (1991). Or "[h]e can decide to present the merits of his claim to a federal court in the first instance," pursuant to 29 U.S.C. § 633a(d). Id. at 6. This Court has held that these two potential routes are not mutually exclusive: filing an administrative claim with the EEOC does not foreclose the option of proceeding directly in federal court. *Langford v. U.S. Army Corps of Eng'rs*, 839 F.2d 1192, 1195 (6th Cir. 1988) (holding that "the ADEA places no limitations on the filing of a civil action when an employee has filed an age discrimination complaint with the EEOC and . . . the regulations contemplate the filing of civil actions without exhaustion of administrative remedies").

The question here is whether McKnight exhausted the administrative prerequisites to bringing a *class action* suit; he undoubtedly exhausted the process with regard to his individual ADEA claim. *See, e.g., Monreal v. Potter*, 367 F.3d 1224, 1233 (10th Cir. 2004) ("[W]e have held that *class* claims cannot be exhausted through an *individual* complaint."). We agree with the District Court that McKnight did not exhaust his administrative remedies with regard to his class action counts. EEOC regulations dictate the requirements for exhaustion of class allegations. The written EEOC complaint must contain allegations regarding numerosity, commonality, typicality, and adequate representation. 29 C.F.R. § 1614.204(a)(2). A claimant seeking to file a class complaint "must seek counseling and be counseled" with regard to such a claim. 29 C.F.R. § 1614.204(b). After such counseling, a claimant "may move for class certification at any reasonable point in the process

when it becomes apparent that there are class implications to the claim raised in an individual complaint." *Id.* A class administrative complaint "must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent." 29 C.F.R. § 1614.204(c)(1). Furthermore, such a "complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint." 29 C.F.R. § 1614.204(c)(2).

McKnight did not comply with these procedures. In his first informal complaint, the word "class" is crossed out. In his formal EEOC complaint, he charges the Department of Defense with "target[ing] · and discriminating against a select group of people by their age, spe[cifically] including myself." (JA at 164). However, this is insufficient to assert a class claim, as the complaint did not include the specific information required by 29 C.F.R. § 1614.204. The EEOC counselor made no reference to any class claim in his report based on his counseling of McKnight. As the District Court commented, "EEOC counselors are not oracles," (JA at 195), and McKnight's informal and formal filings with the EEOC did not alert the EEOC of any desire to bring a class claim in accordance with EEOC regulations. He cannot now be heard to contend that the EEOC failed to properly counsel him regarding the requirements for a class complaint when he did not express any intent to file such an action in his dealings with the EEOC.

McKnight seeks refuge in the "scope of the charge" rule, which allows a plaintiff to add to his claims based on information discovered during an EEOC investigation.

EEOC v. McCall Printing Corp., 633 F.2d 1232, 1235 (6th Cir. 1980). Yet this doctrine does not aid McKnight here because rather than add to the substance of his claims, he attempts to evade EEOC requirements by transforming an individual action into a class action. As the District Court concluded, "the EEOC has promulgated specific guidelines for the filing and presentation of class complaints that, under [McKnight's] reading of the 'scope of the charge' rule, would be rendered meaningless." (JA at 196.)

As noted, a plaintiff in this Circuit may seek administrative remedies and then bring an ADEA claim against the Federal Government without first exhausting those remedies. *Langford*, 839 F.2d at 1195. Several circuits now follow *Langford*. *See Bankston v. White*, 345 F.3d 768, 772-77 (9th Cir. 2003), Adler v. Espy, 35 F.3d 263, 264-65 (7th Cir. 1994). We recognize that some circuits follow a different approach and have held that once a plaintiff invokes the EEOC's administrative process, he or she cannot bring a direct claim in federal court until exhaustion of that administrative process. *See Ivey v. Rice*, 759 F. Supp. 394, 399 (S.D. Ohio 1991) (collecting cases from First, Second, Third, and Fifth Circuits). In *Ivey*, a district court in our Circuit distinguished *Langford* and held that "[w]here a plaintiff elects to bypass the administrative process in whole *or in part*, he must comply with the notice requirement of § 633a(d) or face dismissal." *Id.* at 402 (emphasis added). Notice, the court elaborated, therefore "would be required in regard to any claims which are not the subject of the EEOC complaint, and in regard to claims for which administrative remedies were not exhausted." *Id.* A panel of this Court affirmed that decision, concluding

that the district court's reasoning was "correct." *Ivey v. Rice*, No. 91-3487, 961 F.2d 1577 (Table), [published in full-text format at 1992 U.S. App. LEXIS 10011], 1992 WL 102498, at *3 (6th Cir. Apr. 29, 1992) (per curiam). A subsequent panel of this Court applied the same reasoning in *Anderson v. Tennessee Valley Authority*, in which the panel expressly approved of the reasoning of another district court which held that "'[although a federal employee may file suit for age discrimination] without having first exhausted his or her administrative remedies, if the federal employee does not do so, he or she must give the . . . EEOC 'not less than thirty days' notice of an intent to file such action.'" No. 92-5811, 991 F.2d 794 (Table), [published in full-text format at 1993 U.S. App. LEXIS 8678], 1993 WL 113730, at *6 (6th Cir. Apr. 13, 1993) (per curiam) (quoting *Thorne v. Cavazos*, 744 F. Supp. 348, 350-51 (D.D.C. 1990)).

Thus, as the District Court correctly noted, any action in which the plaintiff fails to exhaust his or her administrative remedies is subject to the notice requirements of 29 U.S.C. § 633a(d). *See, e.g., Burzynski v. Cohen*, 264 F.3d 611, 617 (6th Cir. 2001). A plaintiff must file a notice of intent to file within 180 days of the alleged discrimination, and must file the action in federal court no less than 30 days after giving such notice. 29 U.S.C. § 633a(d). Here, plaintiff never informed the EEOC of his intent to file a class complaint. McKnight did not satisfy the requirements to bring a class claim under any approach, and the District Court did not err in dismissing his class claims and denying his motion for class certification.

IV.

The District Court considered McKnight's individual ADEA claims under theories of disparate treatment and disparate impact. To state a claim under a disparate treatment theory, a plaintiff must allege that "age was a determining factor in the adverse action that the employer took against him or her." *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1993). McKnight asserts that age discrimination was a motivating factor in the DOD hiring freeze that led to the withdrawal of his job offer, because annuitant status depends on age and nearly all annuitants are over 40 years of age. As the District Court held, however, the Supreme Court's decision in *Hazen Paper Company v. Biggins* forecloses McKnight's claim. 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). In *Hazen Paper*, the Supreme Court held that "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Id.* at 611. Thus, pursuant to *Hazen Paper*, "the ADEA prohibits only actions actually motivated by age and does not constrain an employer who acts on the basis of other factors -- pension status, seniority, wage rate -- that are empirically correlated with age." *Allen v. Diebold, Inc.*, 33 F.3d 674, 676 (6th Cir. 1994) (citing *Hazen Paper*, 507 U.S. at 611). Annuitant status here, like the pension status at issue in *Hazen Paper*, is analytically distinct from age. As the District Court noted, federal employees may reach annuitant status in several ways, none of which directly corresponds to age and two of which are entirely independent of age. (JA at 205 n.4.) The DOD memorandum upon which McKnight bases his claim does not refer to age, but only to the Department's ability to compensate newly-hired

annuitants.

We have held that "an employer may not use any of these factors as a proxy for age, but age itself must be the motivating factor behind the employment action in order to constitute an ADEA violation." *Allen*, 33 F.3d at 676. Indeed, the Supreme Court in *Hazen Paper* carved out a limited exception to its holding. The Court stated that "[w]e do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination." *Hazen Paper*, 507 U.S. at 612-13. However, the Court cautioned that "inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present." *Id.* at 613. McKnight does not allege pretext; rather, he asserts repeatedly in his First Amended Complaint and his brief that the DOD memorandum was expressly discriminatory on its face. McKnight's only allegation that could possibly be read to suggest pretext states that "[a]s virtually all annuitants are over the age of forty (40), the issuance of the Memorandum freezing the hiring of annuitants evidenced discrimination towards a class of people solely due to their advanced age." (First Am. Compl. Par. 24, JA at 27.) This allegation cannot be read to assert pretext, especially because, as a matter of law, the Supreme Court and this Court have held that decisions based on pension and annuitant status alone are not discriminatory.

Hazen Paper also dooms McKnight's efforts to establish age discrimination through circumstantial

evidence, rather than direct evidence. In the absence of direct discrimination, a plaintiff may establish a prima facie violation of the ADEA by alleging "(1) he was at least 40 years old at the time of the alleged discrimination; (2) he was subjected to an adverse employment action; (3) he was otherwise qualified for the position; and (4) he was replaced by a younger worker." *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 521 (6th Cir. 2008). McKnight's First Amended Complaint contains no allegation regarding the age of the person who ultimately took the General Supply Specialist position. Thus, he has not made out a prima facie case. Even if he had, he still has failed to state a claim. If an ADEA plaintiff makes out a claim of prima facie discrimination, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason" for the adverse employment action. *Id.* If the defendant provides such a reason, the burden shifts back to plaintiff to show that the reason was pretextual. *Id.* Here, as discussed above, DOD's asserted basis for the hiring freeze -- concerns regarding the compensation for annuitants -- has been held by the Supreme Court in *Hazen Paper* to be nondiscriminatory under the ADEA as a matter of law. Furthermore, McKnight does not allege pretext; in fact, he asserts that the DOD hiring freeze was directly motivated by the intent to limit the number of newly-hired annuitants.[3]

Finally, any disparate impact claim that may be found in McKnight's First Amended Complaint fails because a prima facie case under a disparate impact theory requires a plaintiff to allege a disproportionate impact on a specific protected group. Gantt v. Wilson Sporting Goods, 143 F.3d 1042, 1048 (6th Cir. 1998). McKnight alleges in his First Amended Complaint that the DOD

memorandum "caused a disparate impact to a protected group of people, annuitants." (First Am. Compl. Par. 20, JA at 26.) The Supreme Court's decision in Hazen Paper compels the conclusion that annuitants, like pensioners, are not a protected group under the ADEA. McKnight argues that the District Court's ruling runs afoul of *Smith v. City of Jackson*, in which a plurality of the Supreme Court stated "we were careful to explain that [in *Hazen Paper*] we were not deciding 'whether a disparate impact theory of liability is available under the ADEA[.]'" 544 U.S. 228, 238, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (plurality) (quoting Hazen Paper, 507 U.S. at 610). However, the District Court clearly did not conclude that the ADEA disallows a disparate impact claim. Rather, the District Court correctly concluded that McKnight has not sufficiently alleged such a claim here.

The District Court did not err in dismissing McKnight's ADEA claims under all asserted theories.

V.

For the foregoing reasons, we AFFIRM the District Court's grant of Defendant's motion to dismiss and denial of McKnight's motion for class certification

Footnotes

*The Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

1The copies of these and other documents in the record are of poor quality and difficult to decipher. However,

McKnight does not dispute their substance as stated by the District Court, and does not dispute that the word "class" is crossed out, although he asserts that he does not remember crossing it out himself. (McKnight Br. at 8 & n.1.)

2The Government filed its motion to dismiss the class allegations as a motion for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). However, a failure to exhaust administrative remedies -- the asserted basis for the Government's motion -- is not a jurisdictional bar, but rather a condition precedent to an action in federal court. *See, e.g., Zipes v. Trans World Airlines*, 455 U.S. 385, 393-98, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982); *Mitchell v. Chapman*, 343 F.3d 811, 819-20 (6th Cir. 2003). Thus, the District Court assessed the Government's exhaustion argument pursuant to Rule 12(b)(6) standards, and we do the same.

3In his brief, McKnight asserts that the DOD memorandum "speaks for itself, in that it suspended the hiring of the older workforce. Thus, Appellant would be able to support his burden of showing pretext in this case." (McKnight Br. at 24.) However, the text of the memorandum as alleged does not suspend the hiring of "the older workforce." It suspends the hiring of annuitants, and *Hazen Paper* held that pension status is analytically distinct from age. Furthermore, by asserting that the memorandum "speaks for itself," McKnight undermines any possible allegation of pretext.

Case No. 3:06-1019

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

SAMMY R. MCKNIGHT, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

ROBERT MICHAEL GATES, Secretary, Department of Defense,
Defendant.

June 20, 2007, Decided
June 20, 2007, Filed

JUDGES: ALETA A. TRAUGER, United States District Judge.

MEMORANDUM

This case comes before the court on a Motion to Dismiss filed by the defendant (Docket No. 26), to which the plaintiff has responded (Docket No. 30), and the plaintiff has replied (Docket No. 37). In addition, the plaintiff has filed a Motion to Certify Class (Docket No. 19-8). For the reasons cited herein, the defendant's Motion to Dismiss will be **GRANTED** and the plaintiff's Motion to Certify Class will be **DENIED.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Sammy R. McKnight is a retired civil service employee of the United States Department of the Army, having served in a position in Korea until September 8, 2001.[1] Mr. McKnight retired as a federal annuitant, having met the service and age requirements for eligibility. Subsequently, in October 2003, Mr. McKnight applied for a new position with the Department of Defense as a GS-2001-11, or General Supply Specialist. On January 26, 2007, Mr. McKnight was offered the General Supply Specialist position, and the next day he accepted it. On February 9, 2004, Mr. McKnight received a phone call from Ms. Pae Son, a Human Resource Specialist with the Civilian Personnel Advisory Center ("CPAC") in Seoul, South Korea. Ms. Pae Son informed Mr. McKnight that the defendant's hiring decision had been suspended due to a Department of Defense memorandum that had imposed a fifty-day hiring freeze with regard to all federal annuitants.

The memorandum to which Ms. Pae Son referred had been issued on February 3, 2004 by the Department of Defense Civilian Personnel Management Services and had been signed by Charles A. Rogers. The memorandum was issued in furtherance of 5 U.S.C. § 9902, as enacted by § 1101 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392, 1629 (November 30, 2003), which created new policies relating to the hiring of annuitants within the Department of Defense. The memorandum stated, in pertinent part: "The Department of Defense (DOD) is developing policy and procedures for the employment of annuitants . . . . Because of pay considerations inherent to annuitant appointments, all such hiring actions should be suspended until the DOD policy is

implemented."

On February 20, 2004, Mr. McKnight received an e-mail message from Ms. Pae Son, attaching a copy of the Memorandum and an official letter from Mr. G.E. Zentner, the selecting official, officially withdrawing the job offer. A current Civil Service employee was subsequently hired for the General Supply Specialist position. The plaintiff's First Amended Complaint does not allege the age of the hired employee.

Mr. McKnight first contacted the Equal Employment Opportunity Commission ("EEOC") on March 10, 2004. (Docket No. 30 at p. 4) This informal complaint contains the following type-written statement: "To file a complaint based on age wherein it is alleged that the suspension of annuitant appointments targeted and discriminates against a select group of people by their age." After the word "age" appears a handwritten notation stating, "specifically including myself." Additionally, the word "class," which had been typed in front of the word "complaint," was heavily crossed out. (Docket No. 30, Ex. 4)

On March 19, 2004, Mr. McKnight wrote a memorandum to his Equal Employment Office counselor concerning his informal complaint. The counselor's report indicates that McKnight's memorandum alleged ". . . the DOD memorandum was highly unfair, unjust and discriminatory against all annuitants, especially himself." (Docket No. 30 at p. 4) On April 4, 2006, Mr. McKnight filed his formal EEOC complaint, No. DCP-04-002. On February 15, 2006, the EEOC mailed Mr. McKnight a notice of his right to file a civil action in federal court based on Appeal No.

01A52877.

The plaintiff filed this action on May 15, 2006, in the Northern District of Georgia, alleging (1) violation of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, and (2) violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, with respect to both the plaintiff and a class of others similarly situated, on both disparate impact and disparate treatment theories of recovery. (Docket No. 19-2) On July 25, 2006, the plaintiff filed a First Amended Complaint alleging identical causes of action. (Docket No. 19-7) Additionally, on October 23, 2006, the plaintiff filed a Motion for Class Certification. (Docket No. 19-8). On September 19, 2006, the parties entered a joint Stipulation of Voluntary Partial Dismissal, dismissing the Title VII claim (Docket No. 19-19) and, on September 21, 2006, the court entered the dismissal. On September 2, 2006, the defendant filed a Motion to Dismiss for lack of venue (Docket No. 19-12), and on October 19, 2006, United States District Judge William S. Duffy of the Northern District of Georgia elected to transfer venue to this court. (Docket No. 19-26) Thereafter, on December 6, 2006, the defendant filed a Motion to Dismiss for failure to state a claim and for lack of subject matter jurisdiction. (Docket No. 26)

ANALYSIS

I. Exhaustion of Administrative Remedies

The defendant alleges that this court lacks subject matter jurisdiction over the plaintiff's class action claims because the plaintiff failed to raise those claims with the EEOC. The court finds that, because the

plaintiff did fail to exhaust his administrative remedies with regard to his class action claims, or to otherwise file notice of those claims, those claims must be dismissed. However, because failure to exhaust administrative remedies is not a jurisdictional bar, but instead a condition precedent to action in district court, the exhaustion issue is more properly analyzed under Rule 12(b)(6) and, therefore, the court will convert the defendant's 12(b)(1) arguments into arguments under 12(b)(6).

A. Proper Standard of Review

Under Federal Rule of Civil Procedure 12(b)(1), once the defendant challenges the court's subject matter jurisdiction, the plaintiff must meet the burden of proving jurisdiction. *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005). A Rule 12(b)(1) motion may either challenge the complaint on its face or contest the factual basis of jurisdiction. *Id.* If the motion challenges the complaint on its face, the plaintiff's burden "is not onerous." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). To defeat a facial challenge, the plaintiff need only demonstrate that the complaint alleges a "substantial" federal claim, which is established by showing that prior decisions do not render the claim frivolous. *Id.* A court evaluating a facial attack must consider the allegations of fact in the complaint to be true. *Jones v. City of Lakeland*, 175 F.3d 410, 413 (6th Cir. 1999). Thus, "the plaintiff can survive the motion by showing any arguable basis in law for the claim made." *Musson Theatrical*, 89 F.3d at 1248.

Alternatively, if a Rule 12(b)(1) motion contests the facts underlying subject matter jurisdiction, the court "must weigh the evidence" in order to determine whether it has the power to hear the case. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). When facts are disputed, "[t]he district court has broad discretion to consider affidavits, documents outside the complaint, and to even conduct a limited evidentiary hearing if necessary." *Cooley v. United States*, 791 F. Supp. 1294, 1298 (E.D. Tenn. 1992), *aff'd sub nom. Myers v. United States*, 17 F.3d 890 (6th Cir. 1994). The court may consider such factual evidence without converting the Rule 12(b)(1) motion into a motion for summary judgment. *Id.*

The defendant disputes subject matter jurisdiction on the basis of fact; specifically, the defendant alleges that the plaintiff did not properly exhaust his administrative remedies with regard to the "class action" claims. However, "the failure to exhaust administrative remedies is not a bar to jurisdiction, but is a condition precedent to [a] plaintiff's case." *Kubicki v. Brady*, 829 F. Supp. 906, 910 (E.D. Mich. 1993), *aff'd* 41 F.3d 1507 (6th Cir. 1994) (Table); *see also Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court.").

The Sixth Circuit has held that "time requirements in statutes designed to eliminate unlawful discrimination in employment are not jurisdictional," in part because those requirements arise from agency regulations, and not from statutory provisions. *Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir. 1987). Of course,

"[e]ven though failure to exhaust administrative remedies is not a jurisdictional bar, it is still a condition precedent to an action" in federal court. *Kubicki*, 829 F. Supp. at 910 (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (per curiam)). Failure to exhaust administrative remedies, therefore, "should be treated 'like a statute of limitations that is subject to waiver, estoppel, and equitable tolling.'" *Id.* (quoting *Boddy*, 821 F.2d at 350).[2] Accordingly, the court will construe the defendant's arguments in favor of dismissing the plaintiff's class action claims under Rule 12(b)(6), for failure to satisfy the condition precedent of exhausting his administrative remedies.

B. Rule 12(b)(6) Standard

In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will accept as true the facts as the plaintiff has pleaded them. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002); *Performance Contracting, Inc. v. Seaboard Surety Co.*, 163 F.3d 366, 369 (6th Cir. 1998). The Federal Rules of Civil Procedure require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). "Indeed it may appear on the face of the

pleadings that recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U.S. at 236. Rather, challenges to the merits of a plaintiff's claim should be "dealt with through summary judgment under Rule 56." *Swierkiewicz*, 534 U.S. at 514.

This term, in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007), the Supreme Court readdressed the pleading requirements under the Federal Rules. Specifically, the Court reconsidered the long-held dictum that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 1968 (quoting *Conley*, 355 U.S. at 45-46). The court rejected a literal reading of the "no set of facts" rule, under which "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* Instead, the court stressed that, although a complaint need not plead "detailed factual allegations," those allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 1964-65. Further, the Court observed that Federal Rule of Civil Procedure 8(a)(2) does require a "showing" that the plaintiff is entitled to relief and that this substantive threshold is not achieved by conclusory assertions. *Id.* at 1965 n. 3. Accordingly, the Court concluded that the "no set of facts" language, "after puzzling the profession for 50 years . . . has earned its retirement." *Id.* at 1969. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of

facts consistent with the allegations in the complaint." *Id.*

Although Federal Rule of Civil Procedure 8 establishes a "liberal system of notice pleading," *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1964-65 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). Accordingly, to survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965; *see also, Swierkiewicz*, 534 U.S. at 508, n. 1; *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer*, 416 U.S. at 236 (a well-pleaded complaint may proceed, even if it appears "that a recovery is very remote and unlikely"). With this standard in mind, the court turns to an analysis of the exhaustion of remedies issue.

C. Plaintiff's Failure To Exhaust The Proposed Class Action Claims

The EEOC has promulgated regulations specifically addressing the administrative exhaustion of class complaints. Under those regulations:

> [a] class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:
>
> (i) [t]he class is so numerous that a consolidated complaint of the members of the class is impractical;
>
> (ii) [t]here are questions of fact common to the class;
>
> (iii) [t]he claims of the agent of the class are typical of the claims of the class; [and]
>
> (iv) [t]he agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

29 C.F.R. § 1614.204(a)(2). An applicant who wishes to file a class complaint "must seek counseling and be counseled" with regard to that complaint and, afterwards, "[a] complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint." 29 C.F.R. § 1614.204(b). Further, "[a] class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent." 29 C.F.R. § 1614.204(c)(1). Finally, "[t]he complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint." 29 C.F.R. § 1614.204(c)(2).

The defendant did not file a class complaint with the EEOC or inform his counselor that he desired to file a class complaint. In fact, in the plaintiff's first written contact with his EEOC counselor, it appears that he crossed out the word "class" in front of the word "complaint," leading to the inexorable conclusion that he did not intend to file a class complaint. (Docket No. 30, Ex. 4) Although the plaintiff's formal EEOC complaint does allege "targeting and discriminating against a select group of people by their age, specifically including myself," that allegation cannot be said to sufficiently alert the reader to the plaintiff's desire to file a class complaint. Rather, the statement is in accordance with the general requirement that a plaintiff alleging discrimination demonstrate that he or she is a member of a protected class. The plaintiff's EEOC complaint is not labeled as a class complaint, and it does not include the specific information required by 29 C.F.R. § 1614.204(a)(2). Nor is that information provided in any of the plaintiff's informal submissions.

The plaintiff attempts to sidestep these omissions by referring to 29 C.F.R. § 1614.105 , which states that, "if the aggrieved person informs the [c]ounselor that he or she wishes to file a class complaint, the [c]ounselor shall explain the class complaint procedures and the responsibilities of a class agent." However, the plaintiff never alleges that he informed his counselor that he wished to file a class complaint. In fact, the plaintiff's very first submission to his counselor--in which the term "class" was crossed through--likely informed his counselor that he did not want to file a class complaint.

Although the plaintiff maintains that his EEOC submissions should have made it "clear that his

intentions were to file a class complaint" and that "[t]he language that he used in his informal complaint evidenced his desire to file a discrimination complaint on behalf of himself and others," a close reading of those submissions belies any such intentions or desires. Further, 29 C.F.R. § 1614.105 does not require the EEOC counselor to interpret the plaintiff's intentions, but only directs that the counselor "shall explain the class complaint procedures," provided that the applicant "informs the [c]ounselor that he or she wishes to file a class complaint." EEOC counselors are not oracles, and where the applicant has not directly informed the counselor, the counselor cannot be expected to divine the applicants' wishes. The plaintiff neither informed the counselor that he desired to file a class complaint nor took the steps to file a class complaint, and the submissions that the plaintiff did file with the EEOC, to the extent that they speak on the subject at all, indicate that he did not wish to file a class complaint at that time.

The plaintiff also attempts to marshal the "scope of the charge" rule to persuade the court that, although his EEOC complaint did not include the class action counts, those counts may be asserted because they "could be expected to grow" from the causes of action that were included in the complaint. However, the plaintiff has cited no case law applying the "scope of the charge" rule to convert a conventional lawsuit into a class action, and the court will decline to do so. Under the "scope of the charge" rule, "the EEOC's complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *Equal Employment Opportunity Commission v. McCall Printing Corp.*, 633 F.2d 1232, 1235 (6th Cir. 1980).

This rule allows subsequent complaints to include causes of action about which the plaintiff was not aware at the time of the filing of the EEOC complaint and were discovered during the ensuing investigation. *Id.*

The court has found no Sixth Circuit precedent expanding a conventional lawsuit into a class action via the "scope of the charge" rule, and for good reason: the EEOC has promulgated specific guidelines for the filing and presentation of class complaints that, under such a reading of the "scope of the charge" rule, would be rendered meaningless. *C.f. Ivey v. Rice*, 759 F. Supp. 394, 400 (S.D. Ohio 1991), aff'd 961 F.2d 1577 (6th Cir. 1992) ("[I]f no sanction may be imposed for failure to comply with the administrative regulations, they would be rendered meaningless, thereby frustrating the goals of the administrative process.") If the only requirement for expanding a conventional law suit into a class action after the closure of the administrative process is that the class action "grows out of" the plaintiff's suit, then it would apply to every potential class action. This would be contrary to the purpose of the "scope of the charge rule. " The "scope of the charge" rule serves as a vehicle to expand causes of action within a lawsuit, and not as a means to add parties to the lawsuit, via class action or any other means. *See Artis v. Greenspan*, 332 U.S. App. D.C. 395, 158 F.3d 1301, 1306-08 (D.C. Cir. 1998) (holding that plaintiffs had failed to exhaust administrative remedies to bring a class complaint where the EEOC complaint contained incomplete class allegations); *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986) ("Allowing class actions without administrative charges that fairly anticipate class claims would undermine the notice and conciliation purposes of the filing requirement.")

The inapplicability of the "scope of the charge" rule to the present case is well illustrated by the operation of another doctrine: the "single filing rule." That rule "allows the administrative charge of one plaintiff to satisfy the charge filing obligations of other plaintiffs" in a class action suit under the ADEA. *Howlett v. Holiday Inns., Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *see also Equal Employment Opportunity Comm'n v. Wilson Metal Casket Co.*, 24 F.3d 836, 840 (6th Cir. 1994) (applying the "single filing rule" in the Title VII context). That is, assuming that the plaintiff has alerted the EEOC to the fact that his claim has class-wide implications, the "single filing rule" allows subsequent plaintiffs--who themselves have not filed timely grievances--to "piggy-back" or join in the original case. *Howlett*, 49 F.3d at 194 (citing *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990). Notably, the "single filing rule" cannot apply in situations, such as this one, where the original plaintiff's administrative complaint does not alert the EEOC to the specific class implications of his claim. *Id.*[3]

For instance, in *Marquis v. Tecumseh Products Co.*, 206 F.R.D. 132, 150-52 (E.D. Mich. 2002), the court addressed whether potential class plaintiffs in a Title VII case who had not met the administrative filing deadlines could "piggy-back" onto earlier filed EEOC charges. The court reasoned that, "while such devices as 'piggybacking' and the 'single-filing rule' might relieve individual class members of their obligation to file separate charges with the EEOC, a class action nevertheless must be supported by at least one representative charge, timely brought by one of the named plaintiffs, which adequately identifies the collective, class-wide nature of the claimed

discrimination." *Id.* at 150. Further, the court noted that, to "satisfy the precondition to the commencement of a Title VII class action, an EEOC charge must alert the employer and the EEOC to alleged class-wide discrimination, and must provide adequate notice of the scope of the proposed class, so that the parties may engage in meaningful conciliation efforts in advance of suit." *Id.* (citing *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1102-05 (11th Cir. 1996)). Finding that the complaints in question did not meet this standard and that no equitable tolling principles applied, the court held that the potential class plaintiffs' failure to exhaust their administrative remedies precluded them from proceeding with a class action. *Id.* at 155.

If, in cases where additional class plaintiffs have affirmatively volunteered themselves, a class action nevertheless may not proceed unless the original EEOC charge adequately identified the class-wide nature of the charges, it can only follow that in cases such as this one--where the existence of additional class plaintiffs is entirely speculative--the standard can be no more lenient. As mentioned above, the plaintiff's communications with the EEOC--in which the word "class" situated in front of "complaint" has actually been crossed-out--and his formal EEOC complaint did not adequately identify the class nature of his claims. Accordingly, the court finds that the plaintiff did not exhaust his administrative remedies with regard to the "class action" counts.

D. The Exhaustion Requirement As Applied to the ADEA

There remains, however, an important issue: whether

the ADEA required the plaintiff to exhaust his administrative remedies at all. Unlike Title VII, the ADEA does not explicitly require plaintiffs to avail themselves of the administrative process before filing suit. Instead, as the Supreme Court has concluded, 29 U.S.C. § 633a provides:

> [There are] two alternative routes for pursing a claim of age discrimination. An individual may invoke the EEOC's administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies. *See* 29 U.S.C. § 633a(b) and (c). A federal employee complaining of age discrimination, however, does not have to seek relief from his employing agency or the EEOC at all. He can decide to present the merits of his claim to a federal court in the first instance. *See* 29 U.S.C. § 633a(d).

Stevens v. Department of the Treasury, 500 U.S. 1, 3, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (1991); *see also Langford v. U.S. Army Corps. of Engineers*, 839 F.2d 1192, 1193-94 (6th Cir. 1988).

Some circuits adhere to the rule that these two potential avenues are mutually exclusive; that is, once a plaintiff invokes the EEOC's administrative process, he or she is barred from filing a federal claim until that process has been exhausted. *See, e.g., Castro v. United States*, 775 F.2d 399, 404 (1st Cir. 1985) (reasoning that, to allow an individual to initiate a civil action after administrative remedies have been initiated, but before they have been completed, would be contrary to the central objectives of conciliation); *McGinty v. U.S. Dept.*

of Army, 900 F.2d 1114, 1117 (7th Cir. 1990) ("While the statute and regulations do not explicitly answer this question, we agree with the circuits that have found administrative remedies, once initiated, must be exhausted before a suite may be filed."); *Purtill v. Harris*, 658 F. 2d 134, 138 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131, 103 S. Ct. 3110, 77 L. Ed. 2d 1365 (1983); *Rivera v. United States Postal Serv.*, 830 F.2d 1037 (9th Cir. 1987), *cert. denied*, 486 U.S. 1009, 108 S. Ct. 1737, 100 L. Ed. 2d 200 (1988); *Bornholdt v. Brady*, 869 F.2d 57, 63 (2d Cir. 1989).

However, in *Langford*, the Sixth Circuit took the opposite position, holding that filing an administrative claim did not foreclose the option of filing directly in district court. *Langford*, 839 F.2d at 1193-94. The *Langford* court reasoned that "the ADEA may be construed to permit the filing of a civil action at any time when an employee or applicant has filed an age discrimination complaint with the EEOC." *Id.* The *Langford* holding was put into question in *Ivey v. Rice*, 759 F. Supp. at 400, a case arising in the Southern District of Ohio, which was ultimately affirmed by the Sixth Circuit. In *Ivey*, the court noted that the Fifth Circuit opinion on which *Langford* had relied in part, *Paterson v. Weinberger*, 644 F.2d 521, 523-24 (5th Cir. 1981), had itself been called into question by a subsequent Fifth Circuit opinion, *White v. Frank*, 895 F.2d 243, 244 (5th Cir. 1990). The *Ivey* court reasoned that "The *Langford* holding may now be subject to question, since under the current version of 29 C.F.R. § 1613.513, the filing of a civil action terminates the administrative proceedings, whereas when *Langford* was decided, the administrative proceedings continued even after the filing of a civil action." 759 F. Supp. at

399. Further, the court distinguished *Langford* in the following manner:

> Since plaintiff did not file suit until after the conclusion of administrative proceedings, this case is not directly analogous to the situation in *Langford*, where the plaintiff filed suit prior to the rendering of a final agency decision. The court in *Langford* was not required to decide what effect the failure to comply with administrative time limits would have on a subsequent civil action. One interpretation of *Langford* would be that noncompliance with administrative procedures would not bar a subsequent civil action, in light of the language in *Langford* that exhaustion of administrative remedies is not required. However, if no sanction may be imposed for failure to comply with the administrative regulations, they would be rendered meaningless, thereby frustrating the goals of the administrative process. The unreasonableness of such a result indicates that the *Langford* holding should be confined to the circumstances in that case.

Id. at 400.

The case at hand is more closely analogous to *Ivey*, where the plaintiff filed suit after the conclusion of administrative proceedings but failed to comply with the time limits governing those proceedings, than to *Langford*, where the plaintiff filed suit prior to the completion of the agency proceedings. In addition, this court finds the reasoning in *Ivey* persuasive. Accordingly, the court finds that the plaintiff's failure

to exhaust his administrative remedies with regard to his class action claims precludes him from bringing those claims at this time.

Moreover, even if the plaintiff were to be permitted under *Langford* to change course and directly file his class action claims in district court, the problem remains that the plaintiff did not comply with the requirements of 29 U.S.C. § 633a(d), which govern that option. Section 633a(d) provides:

> When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

29 U.S.C. § 633a(d). The Sixth Circuit has interpreted this language to require that, in order to file an ADEA claim directly in district court, bypassing the administrative process, the plaintiff must (1) file notice with the EEOC of its intent to file the action within 180 days of the alleged discrimination, and (2) file the civil action no less than thirty days after such notice is given. *See Ivey*, 759 F. Supp. at 402-3; *Anderson v. Tennessee Valley Authority*, 991 F.2d 794 (6th Cir.

1993) (Table) (per curiam); *Milsap v. Mineta*, No. 04-2850 B, 2005 U.S. Dist. LEXIS 45317, 2005 WL 2291227 at *3-4 (W.D. Tenn. 2005) ("What the [p]laintiffs have not addressed, and what is fatal to their position in this [c]ourt's view, is their failure to satisfy the requirements for filing an action in federal court pursuant to the direct route, which they must do.")

As discussed above, the plaintiff did not give the EEOC notice of his intent to file a class action within 180 days of the alleged discrimination, or any time thereafter. Therefore, even if the *Langford* decision could be applied in such a way as to excuse the plaintiff's failure to exhaust his administrative remedies with regard to the class claims, those claims would still be barred by the plaintiff's failure to satisfy the prerequisites for directly filing in district court. Accordingly, the plaintiff's class action claims will be dismissed pursuant to Rule 12(b)(6), and the plaintiff's motion to certify class will be denied.

IV. Plaintiff's ADEA Claim

The defendant has moved to dismiss the plaintiff's personal ADEA cause of action for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In accordance with the Rule 12(b)(6) standard of review set forth above, the court will grant the defendant's motion.

A. Disparate Treatment Theory

To properly state a *prima facie* case for age discrimination under a disparate treatment theory of recovery, a plaintiff's complaint must allege "that the employer acted with the intention of discriminating on

the basis of age." *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 871 (6th Cir. 1990); *see also Hazen Paper Co v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."). This may be accomplished in one of two ways: (1) by alleging direct evidence of discrimination, or (2) by alleging circumstantial or indirect evidence from which discrimination can be inferred. Although the plaintiff's First Amended Complaint specifically alleges only direct evidence of discrimination, the plaintiff's brief in opposition to the defendant's motion to dismiss presented arguments under both the direct and indirect theories of recovery. (Docket No. 30 at p. 10-13) Therefore, the court will examine the complaint for sufficient allegations supporting either theory.

1. Direct Evidence of Discrimination

Direct evidence of age discrimination "is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 829 (6th Cir. 2000); *see also Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994).

The plaintiff alleges that, as demonstrated in the defendant's February 3, 2004 memorandum, the defendant violated the ADEA by basing its hiring decisions on the annuitant status of the defendant. Certainly, the memorandum does indicate that the plaintiff's job offer was withdrawn due to his annuitant status. However, facing a similar fact pattern, the

Supreme Court has held that an adverse employment action based on an employee's pension status or seniority does not violate the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993); *see also Lyon v. Ohio Educ. Ass'n and Professional Staff Union*, 53 F.3d 135, 139-41 (6th Cir. 1995) (holding that an early retirement provision calculating pension benefits, in part, from years to retirement did not violate the ADEA); *Allen v. Diebold*, 33 F.3d 674, 676 (6th Cir. 1994) ("[T]he ADEA prohibits only actions actually motivated by age and does not constrain an employer who acts on the basis of other factors--pension status, seniority, wage rate--that are empirically correlated with age."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994) (holding that firing an older worker to eliminate a high salary did not violate the ADEA); *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n. 17 (5th Cir. 1981) ("[S]eniority and age discrimination are unrelated. . . .").

In *Hazen*, the defendant was fired from his long-held position with the defendant in order to prevent his pension benefits from vesting. *Id.* at 607. In facing what was, at the time, a split among the federal circuit courts of appeal as to whether hiring decisions based on factors, such as pension status or seniority, that correlate with age, the Supreme Court held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609. The court reasoned that disparate treatment "liability depends on whether the protected trait . . . actually motivated the employer's decision" and that the purpose behind the ADEA was to prevent older workers from "being deprived of employment on the basis of inaccurate and

stigmatizing stereotypes." That is, "the ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.,'" *id.* at 611 (citing *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (1985)), and, therefore requires only that "[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Id.*

Accordingly, the Court in *Hazen* held that:

> When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. . . .
>
> On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA . . . may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

Id. (emphasis in original). The holding in *Hazen* applies directly to the case at hand. Annuitant status is analytically distinct from age[4], and the February 3, 2004 memorandum demonstrates only that the defendant was concerned about its ability to pay the pensions of newly hired annuitants. The plaintiff has not alleged that the defendant relied on age as a proxy for characteristics such as productivity but instead maintains the defendant's hiring decision based on annuitant status, on its face, violates the ADEA. In light of *Hazen* and the myriad cases decided in its wake, there is simply no legal basis for the plaintiff's contention.

Hazen does leave the door open for actions alleging that an employer has engaged in age discrimination by "target[ing] employees with a particular pension status on the assumption that these employees are likely to be older." *Id.* at 612-613. That is, an employer may violate the ADEA by using pension status as a pretext for hiring decisions that are actually motivated by the age of the employees in question. However, the Supreme Court also warned that "inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present." *Id.* at 613. In any event, the "pension status as pretext" route cannot aid the plaintiff in this case because Mr. McKnight's First Amended Complaint does not allege that the defendant used annuitant status as a pretext for direct age discrimination. Instead, the complaint asserts that the hiring freeze, based on annuitant status, was discriminatory on its face, and that assertion cannot support a cause of action under the ADEA.

2. Circumstantial Evidence of Discrimination

To properly state a claim of age discrimination by circumstantial evidence, a plaintiff must provide the grounds for a *prima facie* case, under the familiar *McDonnel Douglas* burden shifting structure. That is, the plaintiff must allege: (1) that the plaintiff is a member of the protected class, being between the age of forty and seventy; (2) that the plaintiff was qualified for the position; (3) that the plaintiff was subjected to an adverse employment action; and (4) that the plaintiff was replaced by a younger individual. *See Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1126 (6th Cir. 1998); *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).

The plaintiff has properly alleged that he is within the protected class, that he was qualified for the position (evidenced by the fact that he was actually offered employment just prior to the hiring freeze), and that he was subjected to an adverse employment action when his offer was rescinded. However, glaringly, the plaintiff's First Amended Complaint does not allege that he was replaced by a younger individual. Instead, the First Amended Complaint states, "A current Civil Service employee was subsequently hired for the General Supply Specialist position." (Docket No. 19-7 at P 17). The plaintiff's complaint goes no further to identify this employee, failing to allege that the employee is substantially (or insubstantially) younger than the plaintiff, or even that the employee is not, as well as the plaintiff, a federal annuitant. Accordingly the plaintiff has failed to state a disparate treatment ADEA claim by means of circumstantial evidence.

Moreover, the court makes note of the plaintiff's statements in the First Amended Complaint that the defendant rescinded his job offer "due to the issuance of the February 3, 2004 [m]emorandum" (Docket No. 19-7 at P 52) and that the memorandum "was an attempt by [the defendant] to temporarily limit the number of annuitant appointments" (*id.* at P 19). Typically, if the plaintiff has made out a *prima facie* case in an ADEA discrimination suit, "the burden shifts to the defendant to 'rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.'" *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Due to the fact that the plaintiff alleges that the defendant's hiring decision was based on its desire to limit the number of annuitants--which is a category that is analytically distinct from age, as set forth above--that burden is, already at this stage, presumptively met. That is, based purely on the face of the complaint, the defendant could now show a legitimate, non-discriminatory reason for the hiring freeze--namely, the desire to temporarily limit the number of annuitant appointments.

Once the defendant has made this showing, the plaintiff can prevail only by rebutting the defendant's legitimate, non-discriminatory reason as pretextual. *Manzer*, 29 F.3d 1078 at 1083. In order to show pretext, the Sixth Circuit requires the plaintiff to establish, "by a preponderance of the evidence '(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3)

that they were insufficient to motivate discharge.'" *Hudson v. Insteel Industries Inc.*, 5 Fed. Appx. 378, 383-84 (6th Cir. 2001) (citing *Manzer*, 29 F.3d at 1084). Because the plaintiff's First Amended Complaint alleges that the hiring freeze was motivated by the defendant's desire to limit the number of annuitants, the complaint itself contradicts any argument that this desire (1) had no basis in fact, (2) did not actually motivate the hiring freeze, or (3) was insufficient to motivate the hiring freeze. *C.f. New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) ("'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'") (quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895)). Accordingly, on the face of the complaint, the plaintiff cannot show pretext.

B. Disparate Impact Theory

The Supreme Court has held that the ADEA authorizes disparate impact claims; however, "[t]wo textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith v. City of Jackson*, 544 U.S. 228, 240, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005). Due to specific language in the ADEA, a disparate impact claim cannot succeed where the defendant's action was based on a reasonable factor other than age. *Id.* at 240-42. That is, "certain employment criteria that are routinely used

may be reasonable despite their adverse impact on older workers as a group." *Id.* at 241. Further, "it is not enough to simply allege that there is a disparate impact on workers, or to point to a generalized policy that leads to such an impact." *Id.* "Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'" *Id.* (quoting *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989) (quoting *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977, 994, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988))).

More pertinent to the case at hand, a disparate impact claim must be based on a negative impact *to a protected group. See Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 872 (6th Cir. 1990) ("Under a theory of disparate impact, the plaintiff may establish a prima facie case of discrimination by showing the existence of an employment practice which, although neutral on its face . . . disproportionately affect[s] persons in a legally protected group.") (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)).

The plaintiff's disparate impact allegations refer to "a disproportionately adverse impact on Plaintiff, a member of a protected group, namely, annuitants." (Docket No. 19-7 at P 56). As discussed above, annuitants are not a protected group, because annuitant status does not correspond perfectly to age. Some employees reach annuitant status via a combination of age and employment history, and others reach annuitant status without meeting any age component, through the death of a spouse, or through disability. Certainly, if an employer may discriminate

purposefully on the basis of pension status without violating the ADEA--which, as discussed above, it can--then an employer may take actions with some other purpose that adversely impact workers with vested pensions or annuities. Therefore, the plaintiff has failed to allege that the employment practice in question negatively impacted a protected group and, on that basis, has not adequately stated an ADEA claim under a disparate impact theory.

Because the plaintiff's First Amended Complaint has failed to allege adequate grounds for either the disparate treatment or disparate impact theories of recovery, the remaining counts of the complaint must be dismissed.

CONCLUSION

For the reasons stated herein, the defendant's Motion to Dismiss (Docket No. 26) will be **GRANTED**, and the plaintiff's Motion for Class Certification (Docket No. 19, Ex. 8) will be **DENIED.**

An appropriate order will enter.

ALETA A. TRAUGER

United States District Judge

ORDER

For the reasons expressed in the accompanying Memorandum, the defendant's Motion to Dismiss (Docket No. 26) is **GRANTED** and the plaintiff's Motion to Certify Class (Docket No. 19-8) is **DENIED.** This case is **DISMISSED.**

It is so ordered.

Entered this 20th day of June 2007.

ALETA A. TRAUGER

United States District Judge

Footnotes

1 Unless otherwise indicated, the facts have been drawn from the plaintiffs' First Amended Complaint (Docket No. 19-7).

2 The plaintiff in this case has not submitted any allegations or arguments in favor of waiver, estoppel, or equitable tolling.

3 In *Williams v. Tennessee Valley Authority*, 552 F.2d 691, 693 (6th Cir. 1977), a racial discrimination case under Title VII, the Sixth Circuit first addressed the issue of whether every member of a class needed to exhaust an administrative class complaint in order to join in a federal class action. The court held that they did not. *Id.* at 696-97. However, the court noted that the plaintiff in *Williams* "had presented not only his individual claims but also the class claims of discrimination at the administrative level." *Id.* at 696. Moreover, the *Williams* decision was based in part on administrative defects that existed prior to the EEOC's promulgation of regulations on administrative class actions in 1977.

4 As the defendant has noted, a federal employee may reach annuitant status through several different means,

none of which corresponds perfectly to age. Under 5 U.S.C. § 8410--which applies to all types of annuitants--unless otherwise provided in the Federal Employees' Retirement System, "an employee or Member must complete at least 5 years of civilian service creditable under section 8411 in order to be eligible for an annuity." Under 5 U.S.C. § 8412, an employee may become an annuitant, upon immediate retirement, after reaching a minimum age, *and* after completing a minimum number of years of service (the minimum age decreases as the minimum years of service increases). 5 U.S.C. § 8414 provides for a similar sliding scale for employees who elect early retirement. In addition, there are at least two ways in which a person may become an annuitant that are entirely independent of age. Under 5 U.S.C. § 8441 *et seq.*, widowed spouses may become annuitants without reaching any specific age, and, under 5 U.S.C. § 8451(a)(1)(A), disabled employees may become annuitants provided that they have completed at least 18 months of creditable civilian service.

Filed 101/10/2007
No. 07-5853
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMMY R. McKNIGHT,
Plaintiff-Appellant,
v.
ROBERT MICHAEL GATES, Secretary, Department of Defense,
Defendant-Appellee.

BEFORE: KEITH and SUTTON, Circuit Judges; and ACKERMAN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Footnote

*Hon. Harold A. Ackerman, Senior United States

District Judge for the District of New Jersey, sitting by designation.

CIVIL ACTION NO. 1:06-CV-1165-WSD
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SAMMY R. MCKNIGHT, Individually,
and On behalf of all others
similarly situated,

Plaintiff,

v.

DONALD H. RUMSFELD,
SECRETARY, DEPARTMENT
OF DEFENSE,

Defendant.

COMPLAINT - CLASS ACTION
JURY TRIAL REQUESTED

FIRST AMENDED COMPLAINT

COMES NOW Plaintiff, Sammy R. McKnight, individually and on behalf of all other unnamed persons, by and through counsel, Melville Johnson, P.C., and hereby files this First Amended Complaint against Defendant, Donald H. Rumsfeld, Secretary, Department of Defense, and states as follows:

I. PRELIMINARY STATEMENT AND BACKGROUND

Plaintiff brings this action for age discrimination and disparate impact under The Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e) et seq. and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 et seq. ("ADEA"). Plaintiff seeks declaratory relief; individual and systematic injunctive relief; actual damages; attorney's fees; and costs of litigation for said violations of federal law.

II. PARTIES

1.

Plaintiff is a sixty-two (62) year-old resident of Clarksville, Tennessee, who applied for a position located in Seoul, Korea with Defendant in October, 2003, as a GS-2001-11 General Supply Specialist.

2.

The Department of Defense is a federal government agency and has offices throughout the United States, including Nashville, Tennessee.

3.

Pursuant to Fed. R. Civ. P. 4(I), Defendant must be served through U.S. Attorney General Alberto Gonzalez, US Department of Justice, Room B-103, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001; Secretary, Department of Defense, Donald H. Rumsfeld, 1000 Defense Pentagon, Washington, D.C., 20301; Civil Process Clerk, U.S. Attorney's Office, 75 Spring Street S.W., Atlanta, Georgia 30303.

III. JURISDICTION AND VENUE

4.

This action is brought pursuant to the ADEA, as amended, 29 U.S.C. §§ 621 et seq.. Plaintiff filed a formal charge, No. DCP-04-002, with the Equal Employment Opportunity Commission on April 19, 2004. On February 15, 2006, the EEOC mailed Plaintiff a notice of his right to file a civil action in federal court based on Appeal No. 01A52877. The Notice of Rights Letter is attached hereto as Exhibit 1.

5.

The jurisdiction of this court is invoked pursuant to its original jurisdiction over federal questions 28 U.S.C. § 1331.

6.

Venue lies in the Northern District of Georgia under 28 U.S.C. §1391(b). This case resides in the Atlanta Division of this Court because the Atlanta Division is the forum most convenient for the Plaintiff, especially in light of the fact that it is unclear where witnesses in this action are located.

IV. FACTUAL ALLEGATIONS

7.

On February 3, 2004, the Department of Defense ("DOD") Civilian Personnel Management Services issued a Memorandum, Subject "Employment of Annuitants," (hereinafter "Memorandum"), signed by Charles A. Rogers, Director. The Memorandum was unlawful in its issuance, intent, implementation, and effect.

8.

This Memorandum was issued as a result of Section 9902 of Title 5 of the United States Code, as enacted by Section 1101 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392, 1629 (November 24, 2003), which created new policies encouraging and relating to the hiring of annuitants within the DOD.

9.

These new DOD policies were meant to provide critical hiring flexibility with regard to annuitants in order to ensure there would not be a "drain" on talented, capable DOD employees as an increasing number of employees retired from the Civil Service.

10.

Plaintiff had retired from federal service on September 8, 2001, after his last position with the United States Department of the Army in Korea concluded.

11.

Plaintiff, who during the relevant time period was a federal government civil service retiree and annuitant, subsequently applied for a position with Defendant as a GS-2001-11 General Supply Specialist in October, 2003.

12.

For age purposes, the term "annuitant" is defined as a retired employee of the federal government, who has reached at least the minimum retirement age, who receives an annual annuity, resulting from his or her years of service with the

federal government.

13.

Plaintiff was offered the General Supply Specialist position he had applied for in October, 2003, on January 26, 2004. Plaintiff accepted this job offer on January 27, 2004.

14.

However, on February 9, 2004, Plaintiff was informed during a telephone conversation with Ms. Pae Son, a Human Resources Specialist with the Civilian Personnel Advisory Center ("CPAC") in Seoul, Korea, that his hiring action had been suspended due to the DOD Memorandum, which effectively suspended all hiring actions within the DOD concerning annuitants.

15.

The Memorandum stated in pertinent part: "The Department of Defense (DoD) is developing policy and procedures for the employment of annuitants...Because of pay considerations inherent to annuitant appointments, all such hiring actions should be suspended until the DOD policy is implemented."

16.

On February 20, 2004, Plaintiff received an email message from Ms. Pae Son with a copy of the Memorandum attached, along with an official letter from the selecting official, Mr. G.E. Zentner, officially withdrawing his tentative job offer.

17.

A current Civil Service employee was subsequently hired for the General Supply Specialist

position.

18.

The February 3, 2004 Memorandum was an attempt by DOD to temporarily limit the number of annuitant appointments, thus targeting and discriminating against a select group of people due to their age.

19.

The February 3, 2004 Memorandum was discriminatory on its face, as it directed Human Resources personnel to cease hiring a specific group of people, annuitants, who are virtually all over the age of forty (40).

20.

The Memorandum also caused a disparate impact to a protected group of people, annuitants, because it prevented annuitants from being appointed to any DOD position, regardless of whether the position had been accepted by the annuitant.

21.

Thus, the Memorandum was in direct conflict with the new policies implemented on March 18, 2004, which were created to encourage annuitants to accept civil service positions.

22.

The hiring freeze imposed by the Memorandum lasted approximately fifty (50) days. A second memorandum, dated March 25, 2004, informed Human Resources Directors within the DOD that new policy and procedures, permanently altering hiring policies

with regard to annuitants, was signed on March 18, 2004.

23.

These new policy and procedures allow annuitants to continue to receive their full annuity while receiving full salary for their civil service position.

24.

As virtually all annuitants are over the age of forty (40), the issuance of the Memorandum freezing the hiring of annuitants evidenced discrimination towards a class of people due solely to their advanced age, and was directly in conflict with the new policies that allegedly caused the need for its issuance.

V. CLASS ACTION ALLEGATIONS

Local Rule 23(A)(2) Requirements

a. Basis for Suit Pursuant to Fed. R. Civ. P. 23

27.

This suit is brought pursuant to Fed. R. Civ. P. 23(b)(2) and/or Fed.R. Civ. P. 23(b)(3) in that Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole and/or questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Size and Definition of Class

28.

The size of the class will be determined after discovery on this issue.

29.

The class is defined as all those persons who the Agency discriminated against on the basis of their age when the Agency rescinded job offers and failed to make job offers due to the issuance of the February 3, 2004, Memorandum.

30.

The subclass is defined as all those persons who the Agency discriminated against on the basis of their age who were disproportionately adversely impacted by the Agency's, issuance of the February 3, 2004, Memorandum, unjustified by a legitimate business goal.

c. Adequacy of Representation

31.

Plaintiff Sammy McKnight is a member of the affected class and subclass.

32.

The claims made by the named Plaintiff in this action against Defendant's issuance, intent, implementation, and the effect of the February 3, 2004, Memorandum constituted discrimination on the basis of age against all persons who the Agency rescinded job offers or who the Agency failed to make job offers due to the February 3, 2004, Memorandum.

33.

The claims made by the named Plaintiff in this action are typical of, and common to, the claims of the other unnamed members of the affected class.

34.

The named Plaintiff, as well as the unnamed members of the affected class, were disparately affected by the February 4, 2004, Memorandum.

35.

The injuries suffered by the named Plaintiff as a result of the February 3, 2004, memorandum are substantially similar to the injuries suffered by the other unnamed members of the affected class. The Defendant rescinded job offers and failed to make job offers because of the February 3, 2004, Memorandum to the named Plaintiff and the unnamed members of the affected class.

36

The named Plaintiff's interests, with respect to securing relief from the Defendant's intent, issuance, implementation, and effect of the February 3, 2004, Memorandum, are aligned with, and are not in conflict with, the interests of the affected class.

d. Common Questions of Law and Fact

37.

The claims presented by the named Plaintiff allege questions of law and fact which are common among the members of the unnamed affected class.

38.

The February 3, 2004, Memorandum was discriminatory in its intent, issuance, implementation, and effect against the named Plaintiff and the unnamed members of the affected class.

39.

The February 3, 2004, Memorandum had a disproportionate adverse affect on the named Plaintiff and the unnamed members of the affected class.

40.

Due to the February 3, 2004, Memorandum, the Agency rescinded job offers and failed to make job offers to the named Plaintiff and the unnamed members of the affected class.

41.

The Defendant was aware that the intent, issuance, implementation and the effect of the February 3, 2004, Memorandum, would have a disparate impact on persons on the basis of their age.

42.

The Defendant's reason for issuing and implementing the provisions of the February 3, 2004, Memorandum were unjustified by a legitimate business goal and pretext for discrimination on the basis of age.

e. Satisfaction of Criteria of Fed. R. Civ P. 23(b)(2)

43.

This complaint is based on Defendant's intent, issuance, implementation and the effect of the February 3, 2004, Memorandum on all persons who the

Agency rescinded job offers and failed to make job offers because of the February 3, 2004, Memorandum.

44.

The adverse effects of the February 3, 2004, Memorandum are generally applicable to the named Plaintiff and the unnamed members of the affected class.

45.

The named Plaintiff seeks injunctive and declaratory relief on behalf of himself and on behalf of the unnamed members of the affected class.

46.

Such final injunctive relief will properly be afforded to the class as a whole.

f. Satisfaction of Criteria for Fed. R. Civ. P. 23(b)(3)

47.

This complaint is based on Defendant's intent, issuance, implementation and the effect of the February 3, 2004, Memorandum on all persons who the Agency rescinded job offers and failed to make job offers because of the February 3, 2004, Memorandum.

48.

The adverse effects of the February 3, 2004, Memorandum are generally applicable to the named Plaintiff and the unnamed members of the affected class.

49.

Thus, there are common questions of law or fact

central to the named Plainiffs' claims and the unnamed members of the affected classes claims. Further, the substantive elements of the named Plaintiff's claims and the unnamed members of the affected classes claims would require the same proof.

50.

A class action suit is a superior method of litigating this case in that it would conserve judicial resources versus multiple individual lawsuits being filed. Further, due to the commonality present in the claims of the named Plaintiff and the unnamed members of the affected class, the class action method promotes efficiency over each member having to litigate repetitious actions against the Defendant.

Count I: Violation of ADEA - Age Discrimination - Named Plaintiff

51.

Plaintiff incorporates by reference paragraphs 1-50 of his Complaint as if fully set forth herein.

52.

Defendant rescinded its job offer to Plaintiff, due to the issuance of the February 3, 2004 Memorandum, which was discriminatory on its face, in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 et seq.

Count II: Violation of ADEA - Age Discrimination - Others Similarly Situated

53.

Plaintiff incorporates by reference paragraphs 1-

52 of his Complaint as if fully set forth herein.

54.

Defendant rescinded job offers and failed to make job offers to others similarly situated to Plaintiff, due to the issuance of the February 3, 2004 Memorandum, which was discriminatory on its face, in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 et seq.

Count III: Violation of ADEA - Disparate Impact - Named Plaintiff

55.

Plaintiff incorporates by reference paragraphs 1-54 of his Complaint as if fully set forth herein.

56.

The Memorandum issued by Defendant, unjustified by a legitimate business goal, had a disproportionately adverse impact on Plaintiff, a member of a protected group, namely, annuitants.

Count IV: Violation of ADEA - Disparate Impact - Others Similarly Situated

57.

Plaintiff incorporates by reference paragraphs 1-56 of his Complaint as if fully set forth herein.

58.

The Memorandum issued by Defendant, unjustified by a legitimate business goal, had a disproportionately adverse impact on others similarly situated to Plaintiff, also members of a protected group,

namely, annuitants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court grant the following relief:

a. Declaratory relief;

b. Individual and systematic injunctive relief;

c. Actual damages; and

e. Attorney's fees, costs of litigation and any other relief the Court deems just and proper.

JURY DEMAND

Plaintiff requests a jury trial on all questions of fact raised by this Complaint. Respectfully submitted this 25th day of July, 2006.

MELVILLE JOHNSON, P.C.
s/ Christopher D. Vaughn
Christopher D. Vaughn
Georgia Bar No. 726226

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